

**Before the
Federal Communications Commission
Washington, D.C. 20554**

FCC 05M-17
04239

In The Matter of)	MB Docket No. 04-191
)	
San Francisco Unified School District)	
)	
For Renewal of License for Station)	Facility ID No. 58830
KALW(FM), San Francisco, California)	File No. BRED-19970801YA
)	

MEMORANDUM OPINION AND ORDER

Issued: March 30, 2005

Released: April 1, 2005

Preliminary Statement

1. This is a ruling on Enforcement Bureau's Motion to Enlarge Issues filed on February 15, 2005. Renewal Applicant San Francisco Unified School District ("SFUSD") filed an Opposition on March 2, 2005, accompanied by Declaration of Nicole Sawaya. The Enforcement Bureau ("Bureau") filed its Reply on March 16, 2005.

2. The Bureau alleges that on September 28, 2004, in her deposition testimony, the current General Manager ("GM") of Station KALW(FM) ("Station"), Ms. Nicole Sawaya, indicated that she had had nothing to do with the substance of SFUSD's response to a letter of inquiry ("LOI"). The facts supporting the Motion to Enlarge Issues reflect that SFUSD was served with LOI dated February 5, 2001, and responded on April 5, 2001. By her Memorandum dated March 8, 2001, ("March 8th Memorandum") Ms. Sawaya expressed "her views as to how the LOI should be answered." The Bureau argues that the substantive content of the March 8th Memorandum is inconsistent with her deposition testimony with respect to her involvement in preparing SFUSD's reply.

3. The Bureau also alleges that Mr. William Helgeson, the Station's Operations Manager ("OM"), testified on September 28, 2004, in his deposition that he did not know or did not recall supplying factual details in connection with SFUSD's response to the LOI. Mr. Helgeson supplied the only verifying declaration to the response. In addition, it appears that in responding to questions of the LOI concerning ownership reports and issues/programs lists in the Station's public inspection file in 1997, Mr. Helgeson merely relied on a certification by a former Station manager rather than on personal knowledge of Station business records.

4. The Bureau seeks the following issue:

To determine whether San Francisco Unified School District made misrepresentations of fact and/or lacked candor during discovery.

Background

5. On November 3, 1997, Golden Gate Public Radio ("GGPR") filed *pro se* a petition to deny the captioned renewal application of SFUSD. *HDO* at Para. 1. By *Hearing Designation Order and Notice of Apparent Liability for Forfeiture*, 19 F.C.C. Rcd 13326 (2004) ("*HDO*"), this hearing was commenced on July 16, 2004. The substantive issues set under the *HDO* concern the completeness of SFUSD's public inspection file, its effect on SFUSD's qualifications to hold a license, and whether SFUSD had misrepresented or was lacking in candor with respect to its certification to the Commission that it had complied with the rules regarding documentation required to be placed timely in the station's public inspection file.

Issues

6. From an investigation conducted by the Bureau and GGPR's petition to deny, it appeared to the Commission that "SFUSD has failed to timely place or retain in the KALW(FM) public inspection file quarterly issues/programs lists and supplemental ownership information, while certifying in its renewal application that it had done so." *Id.* Accordingly, the Commission set the following issues for formal hearing:

- (1) To determine whether San Francisco Unified School District falsely certified its application with respect to the completeness of the KALW(FM) public inspection file and the effect thereof on its qualifications to be a Commission licensee.
- (2) To determine whether San Francisco Unified School District made misrepresentations of fact or was lacking in candor and/or violated Section 73.1015 of the Commission's Rules with regard to its certification in the subject license renewal application that it had placed in the KALW(FM) public inspection file at the appropriate times the documentation required by Section 73.3527, and the effect thereof on its qualifications to be a Commission licensee.
- (3) To determine, in light of the evidence adduced pursuant to the specified issues, if the captioned application for renewal of license for station KALW(FM) should be granted.

HDO at Para. 24.

7. The Commission also ordered that irrespective of whether the record supports a denial of license renewal, it shall be determined whether a forfeiture not to exceed \$300,000 would be appropriate. *Id.* at Para. 25.

8. On Motion to Enlarge the Issues filed by SFUSD, the Presiding Judge added an issue to receive limited evidence on meritorious service. *See Memorandum Opinion and Order*, FCC 04M-31, released October 8, 2004. The Presiding Judge ruled:

Under the circumstances, SFUSD will be permitted to introduce evidence on meritorious service. But such evidence will be limited in scope to one year of programming prior to the filing of the petition to deny (November 3, 1996 to November 3, 1997), and one year of programming prior to release of the *HDO* (July 16, 2003 to July 16, 2004).

Bureau Discovery

9. On February 5, 2001, SFUSD was served with an LOI which called for answers to completeness of the Station's public inspection file as of August 1, 1997, with respect to: (a) ownership and supplemental ownership reports; (b) issues/programs lists; and (c) listing of donors. 47 C.F.R. § 73.3527. The LOI also asked whether the Station's public inspection file was current as of February 5, 2001. The Station's response was prepared and filed on April 5, 2001, by former Station GM Earnest Sanchez.

10. SFUSD continues to "believe that [the] public inspection files, as of August 1, 1997, contained all required issues/program list materials for the entire period in question." *HDO* at Para. 10 (citing SFUSD April 5, 2001, letter at 5). But with respect to lists of locally produced programs, SFUSD is "unable to explain what may have happened" to the missing list of issues covered by its locally produced programs. *Id.*

11. On September 14, 2004, the Bureau served its request for documents, and commenced deposition discovery. The Bureau requested:

All documents relating to the preparation, approval, filing and maintenance of the Station Issues/Program Lists from December 1, 1990 to the present.

12. At her deposition of September 28, 2004, Ms. Sawaya was asked by Bureau counsel about her role in the response to the LOI. Ms. Sawaya testified that she has been GM since March 1, 2001, and that she first became aware of a challenge to the station's license renewal "about two or three days after I had started work." (Tr. 367-368.) She denied having been requested by anyone at the Station to respond to specific questions of the LOI, and she professes to have no knowledge of who was asked to respond on behalf of the Station. (Tr. 369-370.)

13. The Bureau learned through document discovery that beginning March 6, 2001, five days after Ms. Sawaya arrived at the Station, she had had conversations with Mr. Helgeson, the Station's OM. She then wrote her March 8th Memorandum relating to the soon to be filed response to the LOI. In the Memorandum, Ms. Sawaya gave her views on how the LOI should be answered.¹

14. The Bureau contends that it has found two significant inconsistencies: First, the substance of the March 8th Memorandum conflicted with the substance of the final response to the LOI, Second, the substance of the Memorandum conflicted with the representations in her deposition that Ms. Sawaya was not involved with SFUSD's response to the LOI. The Bureau argues that the inconsistencies between the Sawaya deposition, which "reflected that she had nothing to do with the substance of SFUSD's April 2001, response to the LOI," and her March 8th Memorandum in which Ms. Sawaya expressed her views as to how the LOI should be answered, raise substantial questions about her truthfulness at her deposition, particularly with respect to her knowledge and involvement with SFUSD's response to the LOI.

15. The Bureau contends that in his deposition of September 28, 2004, Mr. Helgeson stated that he did not know or did not recall supplying factual details set forth in SFUSD's reply, notwithstanding that he had supplied the only verifying declaration to the response.

Persistent Confusion And Non-Recollection

16. Ms. Sawaya's Declaration of March 2, 2005, in support of SFUSD's Opposition does not clarify the questions of her state of her mind when she wrote the March 8th Memorandum, or when she testified on September 28, 2004. She avers that at the deposition she was "uncertain as to whether I had reviewed the LOI." But she refers to the March 8th Memorandum, noting that it "references the LOI," and "suggests that I must have reviewed it very soon after commencing my employment at KALW." (Declaration at Para. 10.)

¹ Actually, there were two memorandums written by Ms. Sawaya on March 8, 2001. One reflects Ms. Sawaya's general impressions. The second is more detailed with respect to questions addressed to SFUSD by the LOI, and references the LOI as a subject of the memorandum. It is the more detailed memorandum that is referred to as the "March 8th Memorandum. Ms. Sawaya states in her Declaration in support of SFUSD's Opposition, that she prepared the March 8th Memorandum with substantive statements. Because there are possible issues of privilege, at the request of the parties, the details of the memorandums need not be disclosed at this time.

17. Ms. Sawaya declares that if she had reviewed the March 8th Memorandum before the deposition, she "might have been able to state with more precision what information I had provided to Mr. Sanchez for use in his preparation of the LOI response." (Declaration at Para. 10.) In January 2005, after she was deposed, Ms. Sawaya searched her computer and she discovered that a technician had transferred (or retained) the March 8th Memorandum to a new drive, which fact Ms. Sawaya acknowledges as constituting "additional evidence that I was its author." (Declaration at Para. 11.) In other words, a copy of the March 8th Memorandum was available to Ms. Sawaya on her computer which she could have reviewed before her deposition. And as of March 2, 2005, she still did not have an "independent recollection of having drafted the March 8th Memorandum."

18. Ms. Sawaya participated in a review of Mr. Sanchez's final draft of SFUSD's response to the LOI. The draft reflects conversations between Mr. Sanchez and Ms. Sawaya. Yet she declares: "I do not recollect having any substantive conversations with either Mr. Sanchez or Ms. Jenkins." She also admits seeing a draft of the response. She cannot recall seeing multiple drafts and did not recall being asked to provide information or comments. But she does recall seeing the final version of the reply before it was sent to the FCC. But she could not confirm the accuracy of SFUSD's reply to the LOI, has no recollection of comparing the draft reply to her March 8th Memorandum, and has no recollection of substantive conversations with counsel relating to SFUSD's reply. (Declaration at Para. 15.)

19. On March 8, 2001, Ms. Sawaya recommended to Station counsel that the LOI directive No. 1 asking status of ownership reports as of August 1, 1997, be answered "No" because she probably assumed that reports for 1993 and 1995 had been placed in the public file on December 10, 1997, because they were signed on that date. (Declaration at Para. 7.) Concerning LOI directive demanding "details" for "no" responses, she concluded that "all reports were corrected in the fall of 1997 when matters came to the attention of their general manager, Jeff Ramirez." Yet she still was unsure of her answer: "I do not recall how I knew what Mr. Ramirez had done regarding the ownership reports." (Declaration at Para. 7.) Ms. Sawaya declares that she assumed without verifying that the Station's public file were complete and current by March 8, 2001. (Declaration at Para. 8.) She again declared that after reviewing the March 8th Memorandum, she has no "independent recollection" as to what she did or did not find in the public inspection file. At her deposition she had no "independent recollection" of reviewing the LOI. (Declaration at Paras. 9-10.)

20. Ms. Sawaya now declares:

[I]t is clear from the Memorandum that I reviewed the LOI and the Station's public inspection file just after I started working at the Station and expressed my views regarding the responses that should be made to the FCC.

Ms. Sawaya, in effect, has confessed error as to her earlier deposition testimony of September 28, and she seems to have admitted that soon after she arrived as GM, she was briefed on the subjects inquired of by the LOI. (Declaration at Para. 6.)

Analysis And Discussion

21. Motions for adding issues which are based on newly discovered facts shall be filed within 15 days after such facts are discovered by the moving party. *See* 47 C.F.R. § 1.229(b)(3). The Bureau has met this threshold burden. The standard for adding a post-designation issue is whether there is a substantial and material question raised as to whether Ms. Sawaya and/or Mr. Helgeson misrepresented or was lacking in candor in deposition testimony, and whether the totality of the evidence considered arouses a sufficient doubt on that point. *AstroLine Communications Ltd. P'ship v. F.C.C.*, 857 F. 2d 1556, 1561-62 (D.C. Cir. 1988).

22. The Commission approves the adding of post-designation issues. *In re Frank Digesu, Sr., et. al.*, 7 F.C.C. 5459 (1992) (totality of evidence raised substantial and material question on broadcast experience and further inquiry required to determine whether claim was deceptive or misleading). *See also Maria M. Ochoa*, 7 F.C.C. Rcd 6569 Rev. Bd. (1992) (based on rebuttal testimony alone and without formally adding issue, a party may be disqualified for misrepresentation/lack of candor). Commission policy holds:

It is well established that an applicant may be disqualified in the absence of a basic qualification issue for candorless testimony occurring directly before the agency where the misconduct was of such a blatant and unacceptable dimension that its existence cannot be denied.

7 F.C.C. Rcd at 6576, *citing Richardson Broadcast Group*, 7 F.C.C. 1583, 1585 (1992) (collective discrepancies and evasions may disqualify). *See also Old Time Religion Hour, Inc.*, 95 F.C.C. 2d 713, 719 (Rev. Board 1983). Here, it would be appropriate to set an issue which puts SFUSD on actual notice that credibility is in issue in connection with discovery, and will focus testimony at hearing so that the proceeding can be conducted more efficiently.

Ruling

23. Given the scope of repetitive inabilities to recall in deposition, repeated in a Declaration, the record should be flushed out by examination in open court to determine whether Ms. Sawaya was dissembling with repeated non-recalls, or was being truthful in her statements that she could not recall. The testimony of Mr. Helgeson and Ms. Wright, and possibly Ms. Jenkins (associated with Sanchez Law Firm), on fact questions about dates and places of meetings and phone calls would be relevant, although there are possible assertions of attorney-client privilege.

24. Substantial questions have been raised of witness misrepresentation and/or lack of candor raised in discovery testimony before the Commission. The adding of an issue will provide the best notice to SFUSD. In the interest of complete notice and conservation of time, the issue will be, added but limited to deposition testimony of September 28, 2004.²

25. Under the federal rules there is a strong preference for the testimony of live witnesses which allows the fact-finder to observe demeanor. See *Adair v. Sunwest Bank*, 965 F2d 777, 780 (9th Cir. 1992) (articulating purpose of federal courts for preferring live testimony).

Order

Accordingly, IT IS ORDERED that the Enforcement Bureau's Motion to Enlarge Issues filed on February 15, 2005, IS GRANTED in part.

IT IS FURTHER ORDERED that the following issue is added:

To determine whether San Francisco Unified School District through its agents made misrepresentations of fact and/or lacked candor before the Commission during, or in connection with, the discovery testimony of Ms. Nicole Sawaya, General Manager, and the discovery testimony of Mr. William Helgenson, Operations Manager.

IT IS FURTHER ORDERED that the burden of proof and the burden of proceeding on the added issue are assigned to the Commission.

IT IS FURTHER ORDERED that there will be no discovery on the added issue, unless the there is a showing with particularity that further discovery is required for meeting burden of proof.

FEDERAL COMMUNICATIONS COMMISSION³



Richard L. Sippel
Chief Administrative Law Judge

² See FRE 403 (exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time).

³ Courtesy copies of this Order were transmitted to counsel for each of the parties by e-mail on the date of issuance.